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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1478

CHEMICAL CLEANING, INC., JOHN H. RUSCH AND GEORGE LEWIS,

Petitioners,

vs.

THE DOW CHEMICAL COMPANY,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Date: April 9, 1971.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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STATEMENT OF THE CASE.

The Petition is from decisions on an *accounting* for damages arising from petitioners' deliberate disregard for an injunction against continued infringement of Dow's patent. It is a *contempt* case. No effort has ever been made to upset the original judgment from which the injunction issued.

ARGUMENT.

Question No. 1:

Petitioners question whether a consent decree serves to estop the raising of the issue of validity. However, petitioners never sought to challenge either the validity of the Dow patent or the effectiveness of the injunction entered at the close of the original infringement suit. Whether or not *Lear* v. *Adkins*, 395 U. S. 653 (1969) applies to consent judgments is besides the point.

In its former petition for writ of certiorari seeking review of the contempt finding, petitioners commented on the only instance in the trial court where it sought to refer to the "prior art":

> "[A]t the hearing the petitioners attempted and were denied entry into evidence an expired patent. *The purpose was not to attack validity of the respondent's patent*, but for the purpose of establishing" non-infringement. (Emphasis added.) (Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Case No. 77, October Term 1967, page 7.)

Even if the lower court erred in entering a Consent Judgment which included a finding of validity, that "fact" would not excuse petitioners' violation of the subsequently issued writ of injunction. *United States* v. *United Mine Workers of America*, 330 U. S. 258, 293-4 (1947). Had petitioners wanted to contest validity after the Consent Judgment, they should have sought to reopen the judgment pursuant to FED. R. CIV. P. 60(b).

Question No. 2:

Petitioners have been found in contempt of a lawful writ of injunction. *Chemical Cleaning, Inc.* v. *The Dow Chemi-*

cal Co., 379 F. 2d 294 (5th Cir. 1967), *cert. denied* 389 U. S. 1040 (1968). Petitioners argue that the penalty for such a contempt is governed by the patent laws—even though the patent laws say nothing about contempt proceedings—rather than the long-standing practice in contempt cases.

The case law is clear that violations of court orders in "patent cases" are governed by contempt law, not Title 35 U. S. C. *Siebring* v. *Hansen*, 346 F. 2d 474, 480 (8th Cir. 1965); *Broadview Chemical Corp.* v. *Loctite Corp.*, 159 U. S. P. Q. 80, 86 (D. Conn. 1968), *aff'd* 406 F. 2d 538 (2d Cir. 1969), *cert. denied* 394 U. S. 976 (1969). See also *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 455-56 (1932).

CONCLUSION.

For the reasons above stated, the Petition should be denied .

Respectfully submitted,

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